87-1588

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DOYLE D. KING, KENNETH H. COLLIVER, JOHN M. POPPAS, ROBERT ALLEN JOHNSON, AND DALLAS HOWARD BARNETT ..... Petitioners

versus

UNITED STATES OF AMERICA ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES A. SHUFFETT
LAURA SHUFFETT
SHUFFETT AND SHUFFETT
403 Security Trust Building
Lexington, Kentucky 40507
(606) 252-5794
COUNSEL OF RECORD
FOR PETITIONERS

OF COUNSEL FOR PETITIONERS:

William R. Garmer
Lexington, Kentucky

David R. Irvin
Lexington, Kentucky

B.T. Moynahan, Jr.
Lexington, Kentucky

Blake Page
Winchester, Kentucky

R. Burl McCoy
Lexington, Kentucky

John Kevin West
Lexington, Kentucky

QUESTIONS PRESENTED FOR REVIEW

1. Do the provisions of Title 26, U.S.C., §4424 and the self-incrimination privilege of the Fifth Amendment to the Constitution of the United States allow the government to compel a "bookmaker" to prepare and maintain records showing his gross daily wagers under penalty of prosecution for failure to maintain them, and then permit the government to use those wagering records to convict him of conducting an ilegal gambling business under the provisions of Title 18, U.S.C., §1955?

2. May the government avoid the restrictions of the Fifth Amendment to the Constitution of the United States and the provisions of Title 26, U.S.C., §4424, in a prosecution under Title 18, U.S.C., §1955, for conducting an illegal gambling business, by making a determination that the subjective purpose of the "bookmaker" in maintaining records of his wagers was to keep track of his bets rather than to comply with IRS record-keeping requirements?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

RULES AND REGULATIONS:

OTHER AUTHORITIES:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari be issued to review the Judgment and the Opinion of the United States Court of Appeals for the Sixth Circuit entered on November 25, 1987, reversing the Petitioners' convictions for violation of Title 18, United States Code, §1955, and remanding their cases to the Trial Court for a new trial. The Petitioners do not seek a review of that portion of the Opinion which reverses their convictions and remands for a retrial upon the basis of incorrect instructions as found by the United States Court of Appeals for the Sixth Circuit. The Petitioners do seek a review of that portion of the Opinion of the United States Court of Appeals which declined to reverse the decision of the Trial Court refusing to suppress certain seized gambling records, since the United States conceded in its Brief before the

Court of Appeals that suppression of these records would terminate this litigation.

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit reversing the Petitioners' convictions and remanding same for a new trial was entered on November 25, 1987, and is reported at 834 F.2d 109 (6th Cir. 1987), and appears in the Appendix to this Petition.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered and filed on November 25, 1987. A timely Petition for Rehearing was filed by the Respondent, and said Petition for Rehearing was denied by Order of the Court of Appeals entered and filed on February 4, 1988.

This Petition for Writ of Certiorari was served and filed within sixty days of February 4, 1988. This Court's jurisdiction is invoked under the provisions of Title 28, United States Code, §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the Constitution of the United States

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due pro-

cess of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, §1955

§*1955*. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in a single day.

(2) "gambling" includes but is not limited to poolselling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other

searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) . . . . (e)

Title 26, United States Code, §4401

§4401. Imposition of tax

(a) Wagers—

(1) State authorized wagers.—There shall be imposed on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager.

(2) Unauthorized wagers.—There shall be imposed on any wager not described in paragraph (1) an excise tax equal to 2 percent of the amount of such wager.

(b) . . . (c)

Title 26, United States Code, §4403

§4403. Record requirements

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a).

Title 26, United States Code, §4411

§4411. Imposition of tax

(a) In general.—There shall be imposed a special tax of $500 per year to be paid by each person who is liable for the tax imposed under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

(b) Authorized persons.—Subsection (a) shall be applied by substituting "$50" for "$500" in the case of—

(1) any person whose liability for tax under section

4401 is determined only under paragraph (1) of section 4401(a), and

(2) any person who is engaged in receiving wagers only for or on behalf of persons described in paragraph (1).

Title 26, United States Code, §4412

§4412. Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, the Secretary may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

Title 26, United States Code, §4413

§4413. Certain provisions made applicable

Sections 4901, 4902, 4904, 4905, and 4906 shall ex-

tend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation referred to in such sections. No other provision of sections 4901 or 4907, inclusive, shall so extend or apply.

Title 26, United States Code, §4423

§4423. Inspection of books

Notwithstanding section 7605(b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

Title 26, United States Code, §4424

§4424. Disclosure of wagering tax information

(a) General rule.—Except as otherwise provided in this section, neither the Secretary nor any other officer or employee of the Treasury Department may divulge or make known in any manner whatever to any person—

(1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter,

(2) any record required for making any such return, payment, or registration, which the Secretary is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or

(3) any information come at by the exploitation of any such return, payment, registration, or record.

(b) Permissible disclosure.—A disclosure otherwise prohibited by subsection (a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any docu-

ment or information so disclosed may not be—

(1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the administration or civil or criminal enforcement of this title, nor

(2) used, directly or indirectly, in any criminal prosecution for any offense occurring before the date of enactment of this section.

(c) Use of documents possessed by taxpayer.—Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title—

(1) Any stamp denoting payment of the special tax under this chapter,

(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

(3) any information come at by the exploitation of any such document,

shall not be used against such taxpayer in any criminal proceding.

(d) Inspection by Committees of Congress.—Section 6103(f) shall apply with respect to any return, payment, or registration made pursuant to this chapter.

STATEMENT OF THE CASE

The Petitioners were convicted , after a two-week trial and two days of deliberation by the jury, of one count of conducting an illegal gambling business, bookmaking, in violation of Title 18, United States Code, §1955, and received various sentences of imprisonment ranging from three to five years, and fines up to $250,000. The Trial Court had jurisdiction of the charges by virtue of Title 18, United States Code, §3231.

On appeal to the United States Court of Appeals for the

Sixth Circuit, the Petitioners' convictions were reversed and remanded for a new trial due to an error in the instructions given by the Trial Court. The Court of Appeals, in a further ruling, upheld the decision of the Trial Court not to suppress certain seized gambling records. Since the government conceded in its brief before the Court of Appeals that suppression of these records would terminate this litigation, this Petition for Writ of Certiorari is being filed with regard to those issues dealing with the suppression of these records.

The facts leading to the indictment and trial of the Petitioners appeared as follows:

On March 15, 1985, federal agents and local police executed "no-knock" search warrants at a number of places in Central Kentucky. The places searched included the homes, businesses and automobiles of the Petitioners. As a part of the raid and search of Petitioner Colliver's home and automobile, his alleged daily wagering sheets for the months of January, February and March 1985, miscellaneous other betting slips, bottom-line figures (books of account), monthly gambling tax returns for the prior three years and the associated yellow tablets with bets listed which had been reported on those returns as well as other gambling sports sheets, were seized.

Mr. Colliver filed a pre-trial motion to suppress pursuant to Rule 12 of the Federal Rules of Criminal Procedure, the Fifth Amendment to the Constitution of the United States, and Title 26, United States Code, §4424, and requested that the Court suppress the gambling records seized.

At the evidentiary hearing on the motion to suppress, Mr. Colliver testified to the raids and the searches of his home, apartment, car and person, and further that he had had a "wagering stamp" for the year 1985 and had had such for all years since 1980 (required by Title 26, United

States Code, §§4411 and 4412); that he had filed monthly gambling tax returns since 1980 (required by Title 26, United States Code, §4401, et seq.); and that he maintained daily records on yellow tablets of the bets he accepted (required by Title 26, United States Code, §4403). In addition, Mr. Colliver identified the thirty-six yellow tablets and monthly tax returns for the past three years, which had been seized, and the additional yellow pads and sheets for the months of January, February and March, 1985, on which he had recorded his gross daily wagers and bottom-line figures; and he testified that these items contained the raw data that was essential for him to file his wagering tax returns each month. He further testified that he prepared his monthly tablets and tax returns and paid the 2 percent tax on all wagers that he had "helt", i.e. the tax returns did not include wagers that he had "layed off" to someone else. (This complied with the spirit, if not the letter, of tax regulation §44.6419-2.) Afterward he would burn his daily wagering sheets.

The government make great capital of the fact that his monthly return for January, 1985, contains a substantially smaller total for bets accepted than his daily wagering sheets for January. His monthly returns for February and March were not due as of March 15, and they were filed as "estimated" since his daily records had all been seized. Likewise, the amounts estimated were much smaller than the bets totaled by the government from his daily sheets.

The government then called six FBI agents who identified all the documents as being seized in the searches of Mr. Colliver. The government's final witness was FBI agent Stirling, who testified as an expert witness "about gambling operations, book operations, and the analysis of records of clandestine gambling activities". Agent Stirling identified

the various sheets as showing sports wagers for various accounts, whether the bettor won or lost, the dates applicable to the sheets, the gross wagers for January, etc., and further testified that the records were necessary for the bookmaker to carry on his business and know who he owes or who owes him.

And, on cross-examination he testified:

Q. Mr. Sterling (sic), with regard to these records that you just looked at, it is true, is it not, that those records can have, and usually always do have, two purposes; one, the business purpose you mentioned; and, two, the other purpose of complying with the tax laws, assuming that the person intends to comply with them?

A. Assuming the persons intends—if he has a stamp and intends to comply to the two percent wager activity, certainly the raw material is there by the wagers he has accepted.

Q. You have to have raw material to have records to fill out the tax returns?

A. Absolutely. Again, a bookmaker needs to know what he's accepting if he's going to pay the two percent.

MR. SHUFFETT: No further questions.

The Trial Court orally found, with regard to the daily sheets that "I'm going to admit those because it appears to the Court that there was some other motivation for keeping and maintaining those records, other than for the preparation and filing of tax returns," but sustained the motion as to the thirty-six tablets and tax returns.

At the trial, agent Stirling again testified as a "gambling" expert for the government. On the Colliver records he indicated that the yellow sheets were the actual daily wagering sheets, that he was able to date the sheets from his records at his laboratory in Washington, and that the bottom figures on the Colliver sheets were like accounts recei-

vable or accounts payable of any other business. He was then able to take the Colliver records and opine that the DK account listed in Mr. Colliver's records was Mr. Doyle King. Also, he correlated the account "Bern" in the Colliver records to the records of the Barnett-Johnson enterprise, and the account "Pop 1500" in Mr. Colliver's records to the "Red 1500" in Mr. Poppas' records. He further espoused his definition that all bets between bookmakers are layoff bets and that they could not be personal bets, and he further indicated that even though bookmakers think they are independent, in his opinion because of constantly checking line information, they are "facilitating" in an association with each other. In summary, agent Stirling was able to take the seized Colliver records and tie sufficient other defendants together into an alleged association of five or more persons to bring them under the prohibitions of Title 18, United States Code, §1955.

On appeal, the Court of Appeals held:

> ....The betting sheets admitted into evidence bore little resemblance or connection to those records maintained for the Internal Revenue Service. The evidence indicates that he kept substantially understated and incomplete records for tax purposes, and it is patently apparent that the betting sheets were kept solely for the business purpose of keeping track of his many bets. These betting sheets were not kept to comply with record-keeping requirements. When the government discovers such freely-prepared documents, the existence of a statute coincidentally requiring their maintenance does not transform the voluntary admission into coerced incrimination. *See Andresen v. Maryland,* 427 U.S. 463, 470-77 (1976). *See also United States v. Brian,* 507 F.Supp. 761, 788-69 (D.R.I. 1981), *aff'd sub nom. United States v. Southard,* 700 F.2d 1 (1st Cir. 1983), cert. denied,

464 U.S. 823 (1984). (Emphasis added)

The Petitioners therefore respectfully request the Court to examine the following two questions and those other questions fairly included therein:

1. Do the provisions of Title 26, U.S.C., §4424 and the self-incrimination privilege of the Fifth Amendment to the Constitution of the United States allow the government to compel a "bookmaker" to prepare and maintain records showing his gross daily wagers under penalty of prosecution for failure to maintain them, and then permit the government to use those wagering records to convict him of conducting an illegal gambling business under the provisions of Title 18, U.S.C., §1955?

2. May the government avoid the restrictions of the Fifth Amendment to the Constitution of the United States and the provisions of Title 26, U.S.C., §4424, in a prosecution under Title 18, U.S.C., §1955, for conducting an illegal gambling business, by making a determination that the subjective purpose of the "bookmaker" in maintaining records of his wagers was to keep track of his bets rather than to comply with IRS record-keeping requirements?

ARGUMENT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE QUESTIONS DECIDED BY A FEDERAL COURT OF APPEALS ON AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

The current wagering excise and occupational taxes evolved from legislation first enacted in 1951. Those laws imposed a 10% tax on wagers placed on sporting events,

betting pools, and lotteries conducted for profit. Those who conducted gambling enterprises within the statutory definition had to pay the 10% tax, and were expected, in turn, to reduce the odds they gave their customers. The law also required operators to make elaborate disclosures, including lists of employees and gross amounts of wagers, and to purchase and display occupational tax stamps. *See* Blakey & Kurland, *The Development of the Federal Law of Gambling,* 63 Cornell L. Rev., pp. 923-1021, at 995, et seq (1978).

In 1968, this Court's decisions in *Marchetti v. United States,* 390 US 39, 19 L Ed 2d 889, 88 S Ct. 697 (1968) and *Grosso v. United States,* 390 US 62, 19 L Ed 2d 906, 88 S Ct 709 (1968), curtailed the effect of the wagering tax statutes' registration requirements on Fifth Amendment grounds. *Marchetti* involved a conviction for conspiring to evade the $50 occupational tax on persons in the business of accepting wagers, failing to pay that tax, and failing to comply with registration requirements. The Supreme Court held that those provisions may not be employed to punish criminally those persons who have defended a failure to comply with the requirements by a proper assertion of the privilege against self-incrimination. (Blakey & Kurland, *supra,* pp. 999-1000).

Grosso extended the *Marchetti* holding by applying it to a conviction for failure to pay the 10% excise tax. This Court noted that the IRS's practice of releasing to local authorities information obtained in enforcing the excise tax raised equally serious self-incrimination problems. This Court left it to Congress to decide how to isolate the wagering information from potential state gambling prosecutions and consequent Fifth Amendment problems. The next year, Congress attempted to alleviate the Fifth Amendment problems by removing the requirement that

the IRS disclose registration information and altering the provision requiring posting of occupational tax stamps. These changes failed to achieve their purpose, however, because information used in tax prosecutions could still be volunteered to state and local officials. (Blakey & Kurland, *supra,* pp. 1000-1001).

In late 1974, Congress revised the wagering tax laws. The new legislation lowered the excise tax from 10% to 2%, increased the occupational tax from $50 to $500, prohibited the disclosure of wagering tax information except to enforce federal tax laws through civil or criminal proceedings, and prohibited the use of tax documents, such as stamps, returns, or registration forms, against the taxpayer in criminal prosecutions unrelated to the collection of taxes. The new prohibitions on disclosure of tax-related information (allegedly) cured the self-incrimination problems identified in *Marchetti* and *Grosso.* (Blakey & Kurland, *supra,* pp. 1002-1003).

Since the enactment of Title 26, U.S.C., §4424, at least three circuits, including the Sixth Circuit, have held the statutory scheme to be constitutional since "Section 4244 (sic) makes the tax disclosures unavailable to law enforcement authorities". *United States v. Merlo,* 704 F.2d 331 (6th Cir. 1983); *United States v. Jeffers,* 621 F.2d 221 (5th Cir. 1980); and, *United States v. Sahadi,* 555 F.2d 23 (2nd Cir. 1977).

If this statutory scheme is constitutional as these Courts have found, then something is seriously wrong. It is patently obvious from reading the Opinion from the United States Court of Appeals from the Sixth Circuit in the case at bar that it directly violated the provisions of Title 26, United States Code, §4424(c), by using at least one of the monthly tax returns to reach the conclusion that the January daily wagering sheets were being kept for some

purpose other than to comply with the tax requirements. It stated "The betting sheets admitted into evidence bore little resemblance or connection to those records maintained for the Internal Revenue Service." Section 4424(c) clearly states that no tax return or information come at by the exploitation of any such document may be used against the taxpayer in any criminal proceeding. This was obviously done in the case at bar.

Thus, the Petitioners submit that the questions presented for review meet the requirements of Rule 17.1(c) of the Rules of the Supreme Court and that this Petition for Writ of Certiorari should be granted.

II. THE DECISION IN THE CASE AT BAR AS WELL AS ANOTHER DECISION OF A FEDERAL COURT OF APPEALS, CONFLICTS WITH THE DECISION OF A THIRD COURT OF APPEALS ON THE QUESTIONS PRESENTED

The Court of Appeals in the case at bar basically followed *United States v. Brian,* 507 F.Supp. 761, 768-69 (D.R.I. 1981), *aff'd sub nom.; United States v. Southard,* 700 F.2d 1 (1st Cir. 1983), *cert. denied,* 464 US 823 (1984). *Brian,* 507 F.Supp. 761, in pertinent part, held:

> In these circumstances, I think the appropriate procedure is as follows. Defendant must initially come forward with some evidence that he kept the seized records because of the statutory mandate. Specifically, he should produce evidence of his compliance with other provisions of the wagering tax laws. Once defendant has made this showing, the government bears the burden of proving that §4403 was not the motivating force for the recordkeeping. If defendant cannot demonstrate his compliance with the other wagering tax provisions, he must adduce some other evidence (such as the age

> and comprehensiveness of the records) to support the inference that he kept the seized documents because of §4403's compulsion. Only then must the government assume the burden of proving that the records were voluntarily maintained.

This should be contrasted with the approach taken in *United States v. Haydel,* 486 F.Supp. 109 (M.D.L. 1980), *affirmed* 649 F.2d 1152 (5th Cir. 1981), *mod.* 664 F.2d 84 (5th Cir. 1981), *cert. denied,* 455 US 1022, 102 S Ct 1721. In *Haydel,* 486 F.Supp. 109, 110-11, the Court held:

> The tax laws (26 U.S.C. Section 4424) prohibit use of any tax return or gambling stamp in such a prosecution, but the government correctly argues that the tax laws do not *per se* forbid the use of records such as these which were independently discovered by the F.B.I. without assistance from the Internal Revenue Service.[1] Thus, the issue presented is purely constitutional: Does the self-incrimination privilege of the Fifth Amendment allow the government to compel the bookmaker to prepare and maintain records showing his gross wagers under penalty of prosecution for failure to maintain them and then use the wagering records to convict him of illegal gambling?
>
> The government argues that there is no Fifth Amendment compulsion here because Haydel was not compelled to disclose the existence or location of the records—they were discovered by F.B.I. surveillance and investigation—and that the government will require no

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1. It should be noted that these records are not those restricted by the provisions of 26 U.S.C., Section 4424(b) prohibiting use in any criminal prosecution except enforcement of the wagering tax law. *These records are raw data from which the returns required by the wagering tax law can be prepared.* (Emphasis added)

assistance from Haydel in verification or identification of the documents or in connecting them to Haydel. In my opinion, the government misapprehends the reach of the Fifth Amendment's protection against compulsory incrimination. The compulsion here occurs, not with the location or verification of the records, but in their creation and maintenance in the first place.

These records are clearly compelled by the government under its statutory revenue scheme, and they are records of criminal activity,[2] and when these documents are used in the prosecution of non-tax related crimes, they constitute compelled incrimination which is prohibited by the Fifth Amendment of our Constitution under the jurisprudence construing Congressional taxation of illegal activities such as gambling.

Thus, it appears clear that the Sixth Circuit decision in the case at bar and the First Circuit decision as represented by *Brian* conflict substantially with the Fifth Circuit decision represented by *Haydel*. The difference appears to be that the Sixth Circuit and the First Circuit permit the courts to make a subjective determination of the purpose of the alleged gambler in maintaining certain records, while the Fifth Circuit seeks to identify the records as properly being protected by the Fifth Amendment or the statute and

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2. The government argues that the activity is not necessarily criminal under federal law because the bookmaker can keep his operation small (fewer than five persons) and short lived (not in excess of thirty days operation or gross revenue of $2,000 in a single day) and thus avoid running afoul of 18 U.S.C. Section 1955. The government argues that the gambler then makes a "free choice" when he elects to continue gambling on a larger scale. I find this argument unpersuasive. Those engaged in gambling are a group "inherently suspect of criminal activities." (*Marchetti v. United States*, 390 U.S. 39, 88 S Ct 697, 702, 19 L Ed 2d 889 (1968)).

then excluding them. The Sixth Circuit in the case at bar, of course, has gone even one step further and permitted the direct violation of Title 26, U.S.C. §4424(c) in order to make this subjective determination.

The Petitioners would advocate that the Court ultimately adopt an objective standard for determining which records are protected by the Fifth Amendment because of the compulsions of the gambling tax laws, and then excluding those records from evidence pursuant to §4424 or the Fifth Amendment, as the case may be. Otherwise, any appropriate protective rule will be easily evaded, just as the Sixth Circuit did in the case at bar. In addition, this is an area of the law where it is quite likely that sophisticated "bookmakers" would actually seek advice from counsel in advance of conducting their affairs. As the law now stands, counsel cannot give advice with any assurance as to which records may be maintained—without having different opinions depending on which section of the country one lives in.

Thus, the Petitioners submit that the questions presented for review meet the requirements of Rule 17.1(a) of the Rules of the Supreme Court and that this Petition for Writ of Certiorari should be granted.

CONCLUSION

The Petitioners submit that because the questions presented are questions decided by a Federal Court of Appeals on an important question of federal law which has not been, but should be, settled by the Supreme Court, and because of the substantial conflict in the decisions of the circuits, this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

JAMES A. SHUFFETT
LAURA SHUFFETT
SHUFFETT AND SHUFFETT
403 Security Trust Building
Lexington, Kentucky 40507
(606) 252-5794
(COUNSEL OF RECORD
FOR PETITIONERS)

OF COUNSEL FOR PETITIONERS:

William R. Garmer
Lexington, Kentucky

David R. Irvin
Lexington, Kentucky

B.T. Moynahan, Jr.
Lexington, Kentucky

Blake Page
Winchester, Kentucky

R. Burl McCoy
Lexington, Kentucky

John Kevin West
Lexington, Kentucky

Appendix

Nos 86-5646/5647/5648/5672/5674

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOYLE D. KING (86-5646),
KENNETH H. COLLIVER (86-5647),
JOHN M. POPPAS (86-5648),
ROBERT ALLEN JOHNSON (86-5672),
and DALLAS HOWARD BARNETT
(86-5674),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed November 25, 1987

Before: MARTIN, WELLFORD and MILBURN, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. Doyle King, Kenneth Colliver, John Poppas, Robert Johnson, and Dallas Barnett challenge their convictions for operating an illegal gambling business involving five or more people in violation of 18 U.S.C. § 1955.[1] They argue that the district court erred

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[1] 18 U.S.C. § 1955 provides:

(a) Whoever conducts, finances, manages, supervises,

in instructing the jury that one contact between a layoff man[2] and a gambling operation is sufficient to include the layoff man within the five persons required by 18 U.S.C. § 1955(b)(ii). We agree and consequently reverse for a new trial.

On March 15, 1985, at the height of two national college basketball tournaments, federal agents and local police executed "no-knock" search warrants at a number of places in central Kentucky. The places searched included John Poppas' home, Dallas Barnett and Robert Johnson's liquor store, and

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directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. . . .

[2]In a typical gambling operation, the bookmaker makes his profit by charging a bookmaker's commission, rather than by winning the bets themselves. Ideally, the bookmaker has equal amounts bet on each side of a contest so that the losing bettors, in effect, pay the winners, and the bookmaker keeps his commission. "Lay off" betting is one way in which a bookmaker can insure that bets on an event will be relatively balanced. A bookmaker with an unbalanced book can reduce his risk of loss by transferring, or "laying off," excess bets to a third person, or "layoff man." For a short dictionary of gamblers' terms, *see United States v. Thomas*, 508 F.2d 1200, 1202 n.2 (8th Cir.), *cert. denied*, 421 U.S. 947 (1975).

Kenneth Colliver's home and automobile. In these and other searches, the government collected a substantial amount of gambling-related material.

Indictments for violations of federal anti-gambling laws were brought against eleven people, some of whom pled guilty. After a winnowing of charges and defendants, the trial proceeded against nine defendants on only one count, conducting an illegal gambling business in violation of 18 U.S.C. § 1955. That statute makes it a federal crime for five or more people to conduct a gambling business in violation of state law. At trial, the government argued to the jury that the defendants exchanged line information and layoff bets. Because of these mutually-advantageous and interlocking relationships, the government contended, the nominally-independent defendants could be counted together as operating a single, integrated illegal gambling business.

At the end of the trial, the district court instructed the jury on the application of 18 U.S.C. § 1955 to layoff men.[3] It said,

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[3]In instructing the jury on the meaning of 18 U.S.C. § 1955, the district court began by explaining that "conduct" is a broad term and "would include any working in the business enterprise . . . ." The court then emphasized, "Now, remember, a mere bettor or a customer, however, would not be participating in the conduct of the business." The district court subsequently turned to the significance of layoffs and line information:

> A person who accepts layoff bets from a bookmaking enterprise, or a person who supplies line information to a bookmaking enterprise, therefore performs a function helpful in operating the bookmaking enterprise, and, therefore, conducts said enterprise, may be counted as one of the five or more participants necessary under Section 1955.
>
> Bets between bookmakers may be personal wagers that are not layoff bets. In instances, however, where a bet is a layoff, then a layoff man is not a bettor but a bet receiver. By accepting over-bets, the layoff man becomes not only a bookmaker but the bookie's insurer and is, therefore, important to a gam-

"One contact is enough for a layoff man to become a bookmaker, and, thus, one of the five persons involved in the business." The defendants objected and requested an instruction requiring the jury to determine that the acceptance of layoffs must "substantially affect" the bookmaker's business for the person taking the layoffs to be counted as one of the five persons involved in the business.

One defendant was acquitted, and the jury found the eight before them guilty of operating an illegal gambling business in violation of 18 U.S.C. § 1955. Five of the convicted defendants, King, Colliver, Poppas, Johnson, and Barnett, now appeal. Each has raised a number of claims and has adopted those of the others. Colliver, Poppas, and Barnett reassert the objection to the jury instructions. Colliver complains that the admission of wagering records violated his constitutional and statutory rights against self-incriminaton, and King challenges the admission of some tape recordings. The other claims do not merit mentioning.

Because 18 U.S.C. § 1955 does not explicitly refer to layoff men, the defendants' objection to the "one contact" jury

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bling operation. The layoff man need not be in contact regularly to perform his insuring function. He must only be available on the day a bookmaker over-bets and wishes to reduce his financial risk by laying off.

One contact is enough for a layoff man to become a bookmaker, and, thus, one of the five persons involved in the business.

I have said that a mere customer cannot be said to conduct a gambling business which he patronizes. If, however, you find beyond a reasonable doubt that the Defendant is a bookmaker and that he regularly exchanges line information or places or accepts layoff bets with another bookmaker, you may consider that Defendant as conducting, financing, managing, directing or owning all or part of the gambling business of the other bookmaker.

instruction raises the significant issue of how layoff men should be treated under the federal anti-gambling business statute. In order to lend some perspective to this issue, we briefly review the history of gambling laws in America.[4]

Throughout our history, the regulation of gambling has been largely left to the state legislatures, which have, in turn, treated gambling with ambivalence. Before the Revolution, gambling was not regarded as a crime. Each of the thirteen colonies, at one time or another, had lotteries and permitted other forms of gambling. There were, of course, early efforts to suppress gambling, but these anti-gambling enactments and prosecutions were sporadic and were usually directed more at the threats to public welfare that attended gambling than at gambling itself.

The general tolerance of gambling continued into the nineteenth century. Many states ran lotteries to raise money, and unlicensed lotteries prospered. Some of these lotteries became mired in scandal, with the corruption of public officials and the disappearance of proprieters with the prizes. Public outcry produced a spate of state enactments prohibiting lotteries, the first appearing in the 1830's. After the Civil War, however, Southern states began to turn to lotteries again as painless means of raising desperately-needed revenue. In the late nineteenth century there was a new series of scandals, most notably those surrounding the Louisiana State Lottery. The ensuing public outrage was so great that even Congress legislated on gambling. In 1890, Congress forbade the use of the postal service for the carriage of lottery paraphernalia. *See* Act of Sept. 19, 1890, ch. 908, § 1, 26 Stat. 465 (codified as amended at 18 U.S.C. § 1302). Five years later, Congress extended the ban to all interstate commerce with the Federal

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[4]For historical treatments of gambling law, *see* R. King, *Gambling and Organized Crime* (1969); Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978).

Lottery Act, the first use of the commerce clause in an area of state and local police power. *See* Act of Mar. 2, 1895, ch. 191, § 1, 28 Stat. 963 (codified as amended at 18 U.S.C. § 1301). After this brief foray into the field of gambling legislation, Congress resumed its hands-off approach to gambling.

During the next half century, the nature of the organizations promoting illegal gambling changed dramatically. Before the 1920's, these organizations, although corrupt, did not typically participate in a panoply of criminal ventures nor indulge in violent crime. But Prohibition introduced a new phenomenon: the crime syndicate. Syndicates got their start with bootlegging, and they quickly expanded their activities to other forbidden areas. Although illegal gambling might not have created the gangster, "it proved to be an activity well suited for him to take over and develop, along with the extortion, prostitution, organized pilfering, fencing, etc. The speakeasy and the hoodlum-guarded roadhouse casino soon prospered together, both often protected by the same 'muscle' and immunized from official harassment by some 'arrangements.' " R. King, *Gambling and Organized Crime* 24 (1969). With the repeal of the eighteenth amendment, organized crime was stripped of one of its most fruitful enterprises. Although some bootleggers made the transition to the legal production of alcohol, organized crime was left with gambling as its largest source of income.

In the 1950's and 60's, organized crime became the subject of much official concern, with investigations by congressional committees and presidential commissions. These investigations revealed that organized crime had spun an expansive network of corruption that entangled local, state, and even federal officials. The investigations also pointed to illegal gambling as the font of organized crime's growing wealth. As a result, these committees and commissions proposed federal legislation designed to undermine organized crime's power. It was in this atmosphere that Congress drafted the

Organized Crime Control Act of 1970, of which section 1955 is a part.

As the legislative history of section 1955 reveals, Congress passed this law in an attempt to attack sophisticated, large-scale illegal gambling operations which Congress thought to be a major source of income for organized crime. *See* 114 Cong. Rec. 15,603 (1968) (remarks of Sen. McClellan upon introducing a predecessor of 18 U.S.C. § 1955) ("Gambling is the principle source of income for the elements of organized crime and it is the purpose of this bill to seek to shut off this flow of revenue by making it a crime to engage in a substantial business enterprise of gambling."); 116 Cong. Rec. 590-91, 603-04 (1970) (remarks of Sens. McClellan and Allot); President's Commission on Law Enforcement & Administration of Justice, *The Challenge of Crime in a Free Society* (1967). The House Judiciary Committee Report on this part of the Crime Control Act explained that the intent

> is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern . . . .

H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4029 [hereinafter "House Report"]. *See also* S. Rep. No. 617, 91st Cong., 1st Sess. 73 (1969) [hereinafter "Senate Report"].

Under the Organized Crime Control Act of 1970, small gambling operations remained the responsibility of the states. Rather than bringing federal power to bear on all illegal gambling, Congress confined federal competence to businesses involving five or more people, and lasting at least thirty days or dealing with $2,000 or more in a single day. Congress was aware, however, that gambling operations are often much larger than can be proved and that law enforcement officials need flexibility in combatting "illegal gambling activities of major proportions." House Report, 1970 U.S. Code Cong. & Admin. News 4029. *See also* Senate Report at 73; 116 Cong. Rec. 603 (1970) (remarks of Sen. Allot).

To permit the government that needed flexibility, the originally-proposed section 1955(b)(1)(ii) defined an "illegal gambling business" as an operation involving five or more people who "participate" in the gambling. This language was objected to, however, on the grounds it swept too broadly. "The word 'participate,' it was argued, could include even the customers of a gambling business, thereby bringing the federal power to bear against such small scale operations as 'Mom and Pop' bookmaking businesses having two owners and three customers." *United States v. Thomas*, 508 F.2d 1200, 1205 (8th Cir.), *cert. denied*, 421 U.S. 947 (1975) (*citing* Hearings on S. 30 and related proposals before Subcomm. No. 5 of House Comm. on the Judiciary, 91st Cong., 2d Sess., ser. 27, 325-326 (1970)). *See* 116 Cong. Rec. 589-91 (1970) (remarks of Sen. McClellan). The statute now reads, "conduct, finance, supervise, direct, or own all or part . . . ." 18 U.S.C. § 1955(b)(1)(ii). The term "conduct" was chosen in order to reach both "high level bosses and street level employees," but not bettors. House Report, 1970 U.S. Code Cong. & Admin. News 4029. "Conduct," explained the House Report, "does not include the player in an illegal game of chance, nor the person who participates in the illegal gambling activity by placing a bet." *Id.*

We have sought to give more precise meaning to this inclusive statute, and the prevailing rule is that a person "conducts" a gambling business if he either performs any act which is necessary to the operation of the gambling enterprise or regularly engages in conduct which is helpful to the enterprise. *United States v. Merrell*, 701 F.2d 53, 55 (6th Cir.), *cert. denied*, 463 U.S. 1230 (1983). Under certain circumstances, a layoff man can clearly fit this formulation. For instance, a layoff man who regularly accepts a substantial amount of excess wagers performs a service that is essential to the profitable running of a gambling operations. *See United States v. Grezo*, 566 F.2d 854, 858-59 (2d Cir. 1977).

The crucial question remains how little contact between a layoff man and a bookmaking operation need be demonstrated for him to be found to have conducted the gambling business and be counted in the statute's jurisdictional five. The majority of the Courts of Appeals that have considered the issue have required proof of regular contacts. *See, e.g., Grezo*, 566 F.2d at 859 (2d Cir. 1977) (approving jury instructions that stated, "[t]he word 'conduct' . . . does not include anyone, including an outside or independent bookmaker who places a single, or isolated bet for his own customer, or who makes isolated and casual, rather than substantial and regular lay-off bets, or who occasionally exchanges line information with the central gambling operation"); *United States v. Avarello*, 592 F.2d 1339, 1347 n.11 (5th Cir.) (approving jury instructions that stated, "it is only when there is a consistent and regular pattern of accepting or placing lay-off bets between bookmakers that one bookmaker can be said to conduct or finance the business of the other bookmaker"), *cert. denied*, 444 U.S. 844 (1979); *United States v. Box*, 530 F.2d 1258, 1266 (5th Cir. 1976) (a layoff man cannot be convicted under section 1955 unless there is evidence that he provided a regular market for layoff bets or otherwise was an integral part of the bookmaking business); *United States v. Turzitti*, 547 F.2d 1003, 1005-06 (7th Cir.) (following *Box*), *cert.*

denied, 430 U.S. 969 (1977); *Thomas*, 508 F.2d at 1206 (8th Cir. 1975) ("[I]solated and casual lay off bets and an occasional exchange of line information may not be sufficient to establish that one bookmaker is conducting or financing the business of a second bookmaker."); *United States v. Hawthorne*, 626 F.2d 87, 91-92 (9th Cir. 1980) (following *Thomas*). *See also United States v. Campion*, 560 F.2d 751, 754 (6th Cir. 1977) ("Nothing in the record suggests that Campion's involvement had a significant or substantial impact upon the gambling enterprise."). *But see United States v. Jenkins*, 649 F.2d 273, 275 (4th Cir. 1981) (adopting a "one contact" rule).

We think a fair interpretation of section 1955 requires the "regular contacts" standard as opposed to the "one contact" rule. In our view, the "one contact" rule violates the long-established judicial policy of interpreting criminal statutes narrowly, strains the meaning of "conducts," and misconstrues the purpose of the statute. Through section 1955, Congress wanted to attack what it perceived as a major source of money for organized crime without encroaching upon the states' traditional jurisdiction over small gambling operations. Given this Congressional intention, the statute should not be construed to encompass a one-time participant. If we were to adopt the "one contact" approach, two local, "Mom and Pop" operations, one of two people and the other of three, that on one occasion placed layoffs with each other could be subjected to federal authority. This would be an unwarranted expansion into local matters of a federal law aimed at national concerns. Congress sought to protect state responsibility in matters local in nature, and it would be inappropriate for us to permit the expansion of federal power into those state preserves.

We consequently agree with Colliver, Poppas, and Barnett that the "one contact" instructions stretches the reach of section 1955. Proof of one layoff, by itself, does not establish that a person conducted the business of a bookmaker.

Although the substantial amount of evidence offered by the government might well have been sufficient to meet the "regular contacts" standard, we cannot know from the verdict whether the jury based its verdict on a finding of only one contact as to some of the defendants. In view of this uncertainty, we must conclude that the instructions were in error.

Although this flaw in the jury instructions requires reversal, the defendants' contentions reveal no other errors. Colliver claims that the admission into evidence of his betting records violated his fifth amendment right against self-incrimination and the protections created in 26 U.S.C. § 4424(c). He argues that tax code provision 26 U.S.C. § 4403 required him to keep these betting records, and, because he was compelled to keep these records, their use against him in this criminal case violated his fifth amendment privilege against self-incrimination. Their use also, according to Colliver, violated 26 U.S.C. § 4424(c), which forbids the use in a non-tax case of any material possessed by the taxpayer that he maintained to comply with the tax code's record-keeping requirement for wagering businesses. We disagree. The betting sheets admitted into evidence bore little resemblance or connection to those records maintained for the Internal Revenue Service. The evidence indicates that he kept substantially understated and incomplete records for tax purposes, and it is patently apparent that the betting sheets were kept solely for the business purpose of keeping track of his many bets. These betting sheets were not kept to comply with record-keeping requirements. When the government discovers such freely-prepared documents, the existence of a statute coincidentally requiring their maintenance does not transform the voluntary admissions into coerced incrimination. *See Andresen v. Maryland*, 427 U.S. 463, 470-77 (1976). *See also United States v. Brian*, 507 F. Supp. 761, 768-69 (D.R.I. 1981), *aff'd sub nom. United States v. Southard*, 700 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 823 (1984).

King attacks the admission into evidence of a tape recording that had been made by some of the defendants as a record of bets in order to settle disagreements with bettors. King's claim that a foundation had to be laid as to the making and preservation of the tape is based on cases where the party making the tape introduces it into evidence. These tape recordings were found at one of the bookmaking operation sites, and the government agent who discovered the recordings testified that they were in the same condition as at the time of seizure. We think this foundation is sufficient to assure the accuracy of the recordings. *See United States v. Fuller*, 441 F.2d 755, 762 (4th Cir.), *cert. denied*, 404 U.S. 830 (1971).

The judgment of the district court is reversed and the defendants granted a new trial.

Oral opinion of the Trial Court for the United States District Court for the Eastern District of Kentucky delivered on April 14, 1986, in United States of America v. Kenneth Colliver, et al, Cr. No. 86-7.

PERIOD OF JANUARY 1985.

THE COURT:	Okay.
MR. RAWLINS:	That's true.
THE COURT:	All right. So Mr. Shuffett's point is well taken, then. You don't object to his point?
MR. RAWLINS:	Well, as far as—
THE COURT:	It's—the pads that he had really gone into involved four days in January—
MR. RAWLINS:	Uh-huh. (Affirmative)
THE COURT:	—and a return had already been filed for January?
MR. RAWLINS:	Right. Well, essentially what the record—loose records showed was a handle of $212,000 for a five-day period in January when the entire monthly return showed only $18,000. That—that's the January proof on that count. That's in essence—
THE COURT:	Which count? The tax count?
MR. RAWLINS:	That would be tax count that deals with January—

THE COURT: Forget about the tax count. He's talking about the admissibility of the others in the gambling.

MR. RAWLINS: You mean the old tax records?

MR. SHUFFETT: No. I'm talking about the daily sheets for three months, January, February, March. Now, I understand Your Honor's ruling. I understand it. I don't agree, but I understand it with regard to January. With regard to February and March there is no evidence, the expert did not testify that there was any tablet which February and March were different from.

THE COURT: Can we say that—

MR. SHUFFETT: And they're just plain daily sheets. There have been no return filed even for February and March at the time they were seized.

THE COURT: What do you say, Mr. Collins?

MR. RAWLINS: Well, I don't think we got to that issue the other day, but I—I don't know what he's saying. What does he want to do?

THE COURT: Well, what I'm saying to you is—is that what I'm ruling is

that where your expert was able to demonstrate, rightly or wrongly—I mean, it stands uncontroverted—that these records were entirely different from that yellow paper, that I'm going to admit those because it appears to the Court that there was some other motivation for keeping and maintaining those records, other than for the preparation and filing of tax returns. You see?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY LEXINGTON

CRIMINAL 86-7

UNITED STATES OF AMERICA..... *PLAINTIFF*

V.

KENNETH H. COLLIVER, et al. ..... *DEFENDANTS*

Eastern District of Kentucky Filed April 16, 1986 at Ashland
Leslie G. Whitmer Clerk, U.S. District Court

ORDER

On April 14, 1986, came the parties by their respective counsel for a final pre-trial conference. The Court heard counsel on the pending motions and being advised,

It Was Ordered:

1. That the Motion of defendant Kirk to Declare Forum Non Conveniens is overruled as moot, counsel for the defendant having withdrawn said motion.

2. That the Motion of defendant Kirk to Adopt Co-defendants Pre-Trial Motions is sustained.

3. That the Motion of defendant Kirk to Compel Government to Specifically Perform Plea Agreement is overruled.

4. That the Motion of defendant Penrod for Reduction of Bond is overruled as moot for the reasons stated by counsel.

5. That the Motion of the United States to Dismiss Counts 8 through 30 of the Indictment be and it is sustained.

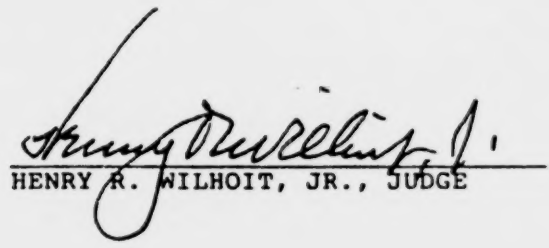
6. That the Motion of the United States to Sever Counts 5, 6, and 7 as to the defendant Kenneth H. Colliver for the purpose of trial is sustained and the trial as to the said severed counts is assigned for May 5, 1986 at 9:00 A.M. at

Ashland, Kentucky, and the Court finds that the period of said continuance is excludable under the provisions of the Speedy Trial Act, 18 USC 3161(h) (8) (A).

7. That the defendant Colliver's Motion to Suppress is sustained as to Government Exhibit 2, 36 yellow pads, and is overruled in all other respects.

8. That upon statement of the United States Attorney that copies of a tape not heretofore furnished to counsel for the defendants will be delivered to counsel on this date, counsel for the defendants are given until Tuesday, April 15, 1986 in which to file objections.

This the 16 day of April, 1986.



HENRY R. WILHOIT, JR., JUDGE

Copies:

U.S. Attorney
Probation
James & Laura Shuffett
William Garmer
Howell Vincent
Kirtley B. Amos
Blake Page
R. Burl McCoy
Henry L. Rosenthal, Jr.
David R. Irvin
Derek Gordon

Nos. 86-5646/5647/5648/5672/5674

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed November 25, 1987 John P. Hehman, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOYLE D. KING (86-5646),
KENNETH H. COLLIVER (86-5647),
JOHN M. POPPAS (86-5648),
ROBERT ALLEN JOHNSON (86-5672),
DALLAS HOWARD BARNETT (86-5674),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Filed February 19, 1988 at Lexington

Before: MARTIN, WELLFORD and MILBURN, Circuit Judges.

JUDGMENT

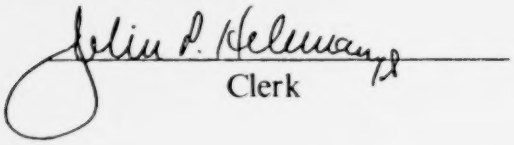
ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the defendants are granted a new trial.

No costs taxed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk



Clerk

A True Copy.

Attest:

Deputy Clerk

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2/18/88

COSTS: None
Filing fee . . . . . $
Printing . . . . . $
Total . . . . . $